In Supreme Court

OF THE UNITED STATES.

October Term, 1900.

NO. 379.

MORTIMER WEBSTER,

Plaintiff in Error.

VS.

THE CITY OF FARGO, *et al.*

Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

REVIEW OF CASES.

NORWOOD V. BAKER, 172 U. S. 769.

The statute involved in the case of Norwood v Baker provided that the assessments "shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of

the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more instalments, and at such times as the council may prescribe," and gave no opportunity to the property owner to be heard in case the council should see fit to levy the assessments according to the front foot rule.

McMillan v. Anderson, 95 U. S. 37. L. Ed. 24-335, was a case of a license tax and is inapplicable to the case at bar. It is conceded that as to license taxes and taxes of that character no hearing need be given.

In Davidson v. New Orleans, 96 U. S. 97. L. Ed. 24, 616, the court says: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, *and those laws provide for a mode of contesting or contest-*

ing the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

"It is not possible to hold that where by the laws of the state the party aggrieved has, as regards the issues affecting his property, a fair trial in a court of justice, according to the modes of proceeding applicable to such case that he has been deprived of that property without due process of law."

In Mobile v. Kimball, 102 U. S. 691, L. Ed. 36, 238, the question arising was that the expense for improving Mobile harbor could not under the constitution then in force be imposed upon the county of Mobile alone; the work being for the benefit of the whole city.

The Court says:

"The objection to the act here raised is different from that taken in the state court. Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. As-

may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as *there is no inquiry into the weight of evidence, or other element of a judicial nature*, and nothing could be changed by hearing the tax-payer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the

state, or on domestic corporations for franchise, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

But when a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. *The officers, in estimating the value, act judicially*, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

"This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, *and in them any defense going either to its validity or amount could be pleaded.* In ordinary taxation, assessments, if not altered by a board of revision or of equalization, stand

good, and the tax levied may be collected by a sale of delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits and, of course, to their validity it is essential that notice be given to the tax-payer and opportunity to afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances."

This case only goes to the extent of holding that the legislature may provide *the manner* of raising means to pay for local improvements *and the district within which* such means shall be raised, and of determining what is due process of law. If special assessments must be levied in proportion to benefits, that is in proportion to enhanced value, this case is conclusive as to the nature of the authority which determines the amount of such benefits and that such determination is not a legislative function.

In Spencer v. Merchant, 125 U. S. 345, L. Ed. 31-763, the statute declared void in the case of Stewart v. Palmer, 74, N. Y. 183, provided that assessments should be levied "upon the lands and premises *which in the judgment of the board should be benefited by such improvements in proportion to the benefit accru-*

ing to them by reason thereof. The statute of 1881 under which the case arose, directed a levy to be placed upon the assessment rolls upon lands the assessments on which had been cancelled under the decisions of the court of appeals. "That the sum *be equitably apportioned* among the several parcels comprising said lands which should be sufficient to refund to the state of New York the sum its due by reason of the cancellation of the former assessments."

The statute further provided that before proceedings to collect said sum, the board "shall apportion the same among the several parcels of land hereinbefore mentioned and *said board shall give ten days' notice of the time and place when they will meet to make such apportionment; and all parties interested in said lands shall be entitled to be heard before said board upon the question of such apportionments.*"

This court says:

"Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a state court cannot inquire."

"The legislature, in the exercise of its power, of taxation, has the right to direct *the whole or a part of the expense of a public improvement* such as the laying out, grading or repairing of a street, *to be assessed upon the owners of lands benefited thereby;* and the

determination of the *territorial district which should be taxed* for a local improvement is within the province of legislative discretion. *If the legislature provides* for notice to and hearing of each proprietor, at some stage of the proceedings, *upon the question what proportion of the tax shall be assessed upon his land*, there is no taking of his property without due process of law."

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property, generally, or only upon the lands benefited by the improvement, is authorized to determine both *the amount of the whole tax*, and the *CLASS* of lands which will receive the benefit and should therefore bear the burden, although it may if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether *their* lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, *what lands*, which might be benefited

by the improvement, *are in fact benefited;* and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, *and its apportionment among the different parcels of the class* which the legislature has conclusively determined to be benefited."

It is not certain from the opinion in this case that the court intended to say that the legislature may determine the amount that each parcel of land is benefited by the improvement or whether benefited at all. It did not so state in terms, and the inference from the context is that when the court says the legislature has the power to determine "what lands" are benefited, it in fact means "what class of lands." The court seems to have been very careful not to add to the legitimate power of the legislature by a holding that it has the power to determine what particular parcels of land are benefited and how much benefit *each parcel* receives. It is evident from the whole opinion that the power attributed to the legislature is the determination generally of what *class of lands* or what district is benefited generally by the improvement. This power is clearly legislative and legitimate. The decision, however, is based

on the question of opportunity of the property owner to be heard.

Our interpretation of the opinion in Spencer v. Merchant is strengthened by the consideration that to interpret the opinion that the legislature might determine the fact and amount of benefit to each parcel of property would be to repudiate the holding of the New York court of appeals in reference to the same assessments. That court following the principles enunciated in the leading case of People v. Mayor 4 N. Y. 420, says:

In Stuart v. Palmer, 74 N. Y. 183, the court says: "The commissioners were to ascertain *what land within the district of assessment was benefited*, and *then to apportion and assess the said sum upon such land, in proportion to benefits.* The assessment when made was declared to be a lien upon the land, and its payment could be enforced by a sale thereof."

"I am of the opinion that the constitution sanctions no law imposing such an assessment, without a notice to, and a hearing, or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing.

The law must require notice to them, and give them *the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority be done.* The legislature may prescribe the kind of notice and the mode in which it shall be given, *but it cannot dispense with all notice.*"

"Assessments for local improvements *can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvements for which they are laid and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another; and in either aspect it would be unconstitutional.* (Kerby v. Shaw, 19 Penn., 258; Schenley v. Commonwealth, 36 id., 29; McGonigle v. Alleghany City, 44 id., 118; In the matter of Washington Avenue, 69 id., 360; Patterson v. Society, etc., 24 N. J., 385; Tide-Water Co. v. Coster, 18 N. J. Eq., 519; In the matter of the Drainage of Lands, 35 N. J., 497; St.

John v. East St. Louis, 50 Ill., 92; Lee v. Ruggles, 62 id., 427; In the matter of Albany Street, 11 Wend., 149; Litchfield v. Vernon, 41 N. Y., 123)."

Walston v. Nevin, 128 U. S. 578; L. Ed. 32-544, came up on motion to affirm and the questions at issue in the case at bar do not seem to have been raised or much discussed. The statute provided with reference to the matter of hearing "that the general council or the courts in which the suits may be pending *shall make all corrections, rules and orders to do justice to all parties concerned.*"

The court says, quoting from Davidson v. New Orleans: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that

personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution. So the *determination of the taxing district* and the *manner of the apportionment* are all within the legislative power. And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied."

In Palmer v. McMahon, 133 U. S. 660; L. Ed. 32: 772, the court, speaking of the power of taxation, says: "The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate t the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law. The *imposition of taxes* is in its nature administrative and not judicial, *but assessors exercise quasi-judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value.*"

"It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the

time during which and the place where such complaints may be made."

In Shoemaker v. United States, 147, U. S. 282; L. Ed. 37-170, it was made the duty of the commission appointed to levy a special assessment "to assess the same upon the lands, lots and blocks situated in said districts *specially benefited* by reason of the location and improvement of said park *in proportion to such benefits of said property;* and if the commission shall find that the benefits are not equal, the costs and expenses of the land obtained for the park, *they shall assess each tract especially benefited to the extent of the benefit thereto.*"

And it furthr provides that the commission should *give due notice of the time and place of their meeting for the purpose of making such assessments for benefits, and all persons interested might appear and be heard.*

The provisions under which assessments in this case are levied are in strict accordance with the rule laid down in Norwood v. Baker.

In Fallbrook Irrigation District v. Bradley, 164, U. S. 112; L. Ed. 41-369, the statute provided for a

tax within irrigation district *according to the value of the property*, for payment of the improvement; and provided *for a board of equalization and notice of its date of meeting "to equalize assessments."* The only question in the case was whether improvements of this character could be paid for *by general taxes* levied *according to the value* of all real property within the district.

The court says:

"Due process of law is not violated, and the equal protection of the laws is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state *and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the* statute."

"Although there is a marked distinction between a general tax and a special assessment, yet the former is still the exercise of an assessment for a local improvement and the levy of same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment as being in violation of the state constitution, yet, as the state court has held them to be without force, we follow its judg

ment in that case, and our attention must be directed to the question whether any violation of the Federal Constitution is shown in such an assessment. Can an ad valorum assessment on the land benefited, or, in other words, can such an assessment as is provided for in sections 18, 20, 21 and 22 of the act, be legally levied in such a case as this? Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not."

This case presented an instance of local taxation that is *general taxation within a certain district*, confined to real property, for a local improvement. There does not appear to have been any provision in the state

constitution requiring uniformity of this class of taxation on all property, real and personal, and the case comes clearly within the established rule that "the legislature may, if not restrained by the state constitution, determine the amount to be raised, the district within which it shall be raised, and *the manner* in which it shall be *distributed* over the district. The legislature had determined *not* that any particular parcels of land would be benefited, but *that the district generally would receive benefit* and that it could be most equitably distributed by general taxation within the district according to value.

Review of cases cited in Brief of Defendant in Error:

In Bauman v. Ross, 167, U. S. 548, L. Ed. 270, the act of congress provided that the special assessments to pay for land condemned should be assessed one-half to the revenue of the District of Columbia and one-half against the property benefited in proportion to benefits received, and appointed a jury to apportion the assessments, and provided that the assessment should be confirmed by the court.

The court says: "The *class of lands* to be assessed for the purpose may be either determined by the legis-

lature itself, by defining a territorial district, or by other designation; *or it may be left by the legislature tot he determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited.*"

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

"If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provisions for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law."

The question involved was only as to the *validity of the assessment of one-half the cost on property specially benefited "proportionally" according to benefits* received.

The decision of the court was that *this* was within the power of Congress under the Federal Constitution.

No decision of the validity or constitutionality of assessments *"in proportion to the position, the front-*

age, the area, or the market value of the lands" was necessary to the determination of the case, and the remarks of the court on that subject are *obiter.*

The case is not an authority in conflict with Norwood v. Baker.

In Wurtz v. Hoagland 114 U. S. 606 L. Ed. 229, the statute provided for the appointment of commissioners and directed the to assess then expense *as nearly as might be in proportion to benefits.* It provided for notice to property owners *and a hearing on the question of the justice of the assessment in court.*

The question decided was that proceedings under the act did not deprive the tax-payer of his property without due process of law. The case is in conformity with Norwood v. Baker.

The case of Shoemaker v. U. S. and McMillen v. Anderson have already been noticed.

From a review of the cases decided by this court we find that it has held that the legislature may determine the amount to be raised by special assessment, the district in which it shall be raised, whether it shall be raised by general taxation or special assessment, and if

by special assessment, the *class of lands* benefited, and the method of apportionment, and that these were legislative functions.

We find further that it has *never* held *that special assessments were authorized or could be imposed in any other manner, than upon the land benefited by the improvement, and according to such benefit; it has never held that the determination of the specific parcels of real property specially benefited, or the amount to which each parcel was specially benefited, was a legislative function, or a determination which the legislature had power to make.*

The inference from all the cases decided in this court, and from the fact it is uniformly held that upon such a determination the property owner has a constitutional right to be heard is that the power is judicial in its nature.

American legislatures are uniformly restricted by constitutional provisions to the exercise of purely legislative powers, and this is recognized in all decisions of this and all other American courts.

The decision in Norwood vs. Baker is no departure from the former decisions of this court.

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ERRATA.

In the original brief of plaintiff in error the following errors occur:

Page 26—Insert quotation marks after the words "municipal corporations" sixth line, the quotation extending continuously from page 22.

Page 31—Add "802a" to last line.

Page 39—Insert quotation marks after "States," third line from the top.

Page 40—The quotation from "7th N. D." extends continuously to the words "cases following Norwood v. Baker" on page 41, and there should be qutation marks after the word "heard" near the bottom of page 41.